Filed 2/23/10 P. v. Rivera CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAYMUNDO RIVERA, Defendant and Appellant.	H033633 (Santa Clara County Super.Ct.No. CC632875)

A jury convicted the defendant, Raymundo Rivera, of murder and robbery. He claims that an instruction on robbery was defective and requires reversing the judgment as to both murder and robbery. He also claims that the total prison sentence and the amount of a restitution fine were miscalculated. Finally, he asks us to review another perpetrator's prison records for certain information that may be useful to his case.

Finding that recent California Supreme Court authority compels rejection of defendant's instructional claim, that review of the records in question yields no relevant information, and that the restitution fine is correct, but that defendant's consecutive sentence lacks a sufficient legal basis, we will reverse the judgment in part and remand for resentencing, while affirming the judgment in all other respects.[1]

[1] Defendant has also filed a petition for writ of habeas corpus, which we have considered with this appeal. We dispose of his habeas corpus petition by separate order.

FACTS AND PROCEDURAL BACKGROUND

I. *Convictions and Sentence*

An information charged defendant with second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c))[2] and murder (§ 187) or, in the alternative, voluntary manslaughter (§ 192, subd. (a)). The information alleged that he used a knife while committing the crimes (§ 12022, subd. (b)(1)).

The jury convicted defendant of first degree murder (§§ 187, 189) and second degree robbery but found the knife-use allegations not true with regard to both the robbery and the murder. The trial court imposed a sentence of 28 years to life in state prison, consisting of three years for the robbery and a consecutive 25 years to life for the murder. The court also fined defendant $10,000 in general restitution.

II. *Facts*

Defendant and another man, Joe Anthony Silva, attacked and robbed a homeless man, Harry Luman, in downtown San Jose. Luman was killed in the process. Although the facts conflicted whether defendant killed or helped kill Luman, the verdicts suggest that the jury decided that only Silva personally carried out Luman's killing.

A. *Prosecution Case*

Three percipient witnesses testified for the prosecution as follows:

Blake Flournoy, a former computer engineer who was homeless after falling on hard times because of drug and alcohol abuse, knew defendant, Silva, Luman, and Amanda Reed as acquaintances. Flournoy was riding his bicycle in downtown San Jose when he saw defendant and Silva attacking Luman while Reed stood by. During the struggle Luman was lying on the ground and Flournoy perceived that defendant was stabbing him and Silva was kicking him in the head and also possibly stabbing him.

---

[2] All further statutory references are to the Penal Code.

Flournoy heard Amanda Reed say " 'Get the money,' " Luman stopped struggling, and defendant ceased making his stabbing motions and began rifling through Luman's pants pockets. At that point Silva had ridden away a short distance on a bicycle. Before defendant and Reed also rode away on bicycles moments later, defendant kicked Luman. Luman lay still after the others left. A few days later Flournoy was in county jail and decided to tell a jailer that he had witnessed the attack. He did this not for any benefit but because at that point he knew Luman was dead and "it just ate me up." Later Reed and her boyfriend found out that Flournoy had told the police about the attack and Reed threatened him that if Flournoy testified against her "I was going to find myself floating in the Guadalupe," meaning the river of that name. Fluornoy acknowledged having suffered four petty theft convictions.

Another individual, Anthony Leonard Whitehead, Jr., who was homeless at the time of the crimes, saw three men, including defendant and Silva, attack Luman as Amanda Reed stood by. The assailants were rummaging in Luman's clothing as they attacked him. He heard Reed say, " 'Come on, let's get out of here,' " and she and defendant left. Silva remained and Whitehead perceived that he was making stabbing motions (he counted two such motions), rummaging through Luman's clothing, and extracting a wallet. Silva rode away from the scene and toward Whitehead. He was holding a wallet and Whitehead heard him say, " '$40, now I can [buy] me a brand new pair of shoes.' " Whitehead did not see defendant stab Luman.

The third witness, Jaime Allen Pastoriza, a homeless individual, testified in court and his extrajudicial statements to police also were introduced in evidence. In his statement to police, Pastoriza related that he saw defendant approach Luman from behind and take his wallet while Luman was urinating. The two struggled and defendant asked Silva to hit Luman. Luman extracted a knife, but Silva hit him, wrested the knife from him, straddled him, and made stabbing motions toward him. In court, Pastoriza testified, "I was in fear of my life kind of" when talking with a police sergeant about two months

after the incident. He also testified that "I've been trying not to even be involved in this case," and agreed with the prosecutor's characterization that "you were concerned about retaliation as a result of giving [the police] a statement." Nevertheless, he insisted that the versions he gave to police at the time of the crimes and, three weeks before trial to a defense investigator—versions including essential inculpatory details about defendant's and Silva's roles—did not come from his own perceptions. In court he testified that he heard about many of the facts from others, and provided another version of his own perceptions, which were much more limited. In this version, Silva told Pastoriza that he was about to rob Luman. Pastoriza then saw defendant and Silva confront Luman. Luman was holding a knife in his left hand and defendant was gripping Luman's left wrist and holding it above Luman's head. Pastoriza could recall little more: "As I turned around, everybody was scattering. And I remember seeing the victim laying [*sic*] there, and that was it." Pastoriza was "pretty high" under the influence of methamphetamine when he witnessed the attack, and it could have affected his ability to perceive events accurately; he could hallucinate under those circumstances. On cross-examination, Pastoriza continued to deny knowing personally the nature and sequence of key aspects of the robbery and murder of Luman.

Later that evening, Cynthia Louise Reeves, a homeless woman, encountered defendant, Silva, and Amanda Reed at a homeless encampment. Reed was "covered in blood" and was holding a blood-covered knife. (Reeves denied earlier telling a police sergeant that Reed, Silva, and defendant all had blood on their clothes.) Defendant was upset and showed signs of remorse for days, unlike Silva and Reed, who were smug or pleased with themselves about the robbery and murder. He said repeatedly that he and others had " 'jacked' " and robbed someone, stated that a knife had been used and that he thought Luman had been killed, and said that they had gotten $140 in proceeds from the robbery. Silva said that he had lacerated Luman with a knife. During this conversation Silva distributed money to defendant and Reeves, handing defendant approximately $50.

A pathologist testified that Luman had suffered four knife wounds and some blunt trauma injuries, including abrasions. One knife wound reached the heart and constituted the fatal injury.

B. *Defense Case*

The defense introduced evidence that Silva, not defendant, killed Luman, and that Silva robbed Luman. A police officer testified that Silva was arrested six days after the murder. He blurted out spontaneously that he did not kill or stab anyone, even though the officer had not told Silva that he was arresting him for such acts and had not mentioned Luman's murder. Another officer who was familiar with Silva testified that on the day after the robbery and murder he happened across Silva and Silva was much better dressed than the police officer knew him to be during prior encounters. Silva displayed signs of nervousness, especially when the officer mentioned that he was investigating Luman's death.

DISCUSSION

I. *Constitutionality of CALCRIM No. 376*

Defendant claims that his right to due process of law was violated under the Fifth and Fourteenth Amendments to the United States Constitution when the trial court instructed the jury with CALCRIM No. 376. He asserts that the instruction allowed him to be convicted of the crimes on proof below the beyond-a-reasonable-doubt standard that is constitutionally required. He contends that the judgment must accordingly be reversed on all counts.

In support of the prosecution's theory that defendant participated in the robbery, the prosecutor introduced Cynthia Reeves's testimony that she saw Joe Silva give defendant approximately $50 on the evening of the robbery and murder. The jury could, of course, infer from this evidence that defendant participated in the robbery because the money represented proceeds from it to which Silva thought defendant was entitled by virtue of his material role in obtaining the money from Luman by force.

In such circumstances, CALCRIM No. 376 or a similar instruction, CALJIC No. 2.15, has long been given. The jury here was instructed[3] according to the terms of CALCRIM No. 376 as applicable to the charges against defendant:

"If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of the crime based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed the crimes.

"The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of the crimes.

"Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."[4]

---

[3] The trial court told the jurors that it would give them copies of the written instructions for use during deliberations and the record offers no reason to doubt that it did so. In these circumstances (*People v. Wilson* (2008) 44 Cal.4th 758, 802) "[t]o the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control." (*Id*. at p. 803; accord, *id*. at p. 804.)

[4] The pattern instruction is to the same effect:

"If you conclude that the defendant knew (he/she) possessed property and you conclude that the property had in fact been recently (stolen/extorted), you may not convict the defendant of _____<*insert crime*> based on those facts alone. However, if you also find that supporting evidence tends to prove (his/her) guilt, then you may conclude that the evidence is sufficient to prove (he/she) committed _____<*insert crime*>.

"The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the

(footnote continued on next page)

The CALCRIM instruction has been in use for only a few years. For many years, however, juries have been given a similar instruction, CALJIC No. 2.15.[5] In *People v. Barker* (2001) 91 Cal.App.4th 1166, for example, the trial court gave this iteration of the instruction: " 'If you find that the defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crimes of *murder* or robbery. Before guilt may be inferred, there must be corroborating evidence tending to prove the defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.' " (*Id*. at p. 1172, fn. omitted.)

As becomes evident in comparing the relevant portions of the two versions, "CALCRIM No. 376 uses language which is very similar to the language of CALJIC No. 2.15. . . . The difference between the two instructions is that the CALCRIM instruction is easier to understand . . . ." (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1575.) "The permissive inference that CALCRIM No. 376 authorizes if the jury finds slight supporting evidence is linguistically synonymous with, and constitutionally

---

property, along with any other relevant circumstances tending to prove (his/her) guilt of _____<*insert crime*>.

"[You may also consider whether _____<*insert other appropriate factors for consideration*>.]

"Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." (CALCRIM No. 376.)

[5] The pattern version of CALJIC No. 2.15 reads, as relevant here: "If you find that a defendant was in [conscious] possession of recently [stolen] [extorted] property, the fact of that possession is not by itself sufficient to permit an inference that the defendant _____ is guilty of the crime of _____. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt." The instruction then proceeds to describe possible corroborating factors for the trier of fact to consider.

indistinguishable from, the permissive inference that CALJIC No. 2.15 authorizes if the jury finds slight corroborating evidence." (*People v. Solórzano* (2007) 153 Cal.App.4th 1026, 1036.)

Of CALJIC No. 2.15, our Supreme Court has stated unequivocally, "nothing in it relieves the prosecution of its burden to establish guilt beyond a reasonable doubt." (*People v. Parson* (2008) 44 Cal.4th 332, 355-356.) *Parson* rejected the defendant's claim that giving the instruction violated due process because it "lessened the prosecution's burden of proof to establish guilt beyond a reasonable doubt." (*Id*. at p. 355.) *People v. Harden* (2003) 110 Cal.App.4th 848 reached much the same conclusion: "Courts have consistently concluded that CALJIC No. 2.15, when given with other instructions on the elements of offenses and the burden of proof, does not alter the prosecution's burden to prove a defendant's guilt beyond a reasonable doubt or otherwise violate a defendant's constitutional rights." (*Id*. at p. 857.) CALCRIM No. 376 is additionally protective of a defendant's right to have the trier of fact determine each element of the charged crimes beyond a reasonable doubt (see, e.g., *People v. Coelho* (2001) 89 Cal.App.4th 861, 874-875). Whereas "there is nothing in [CALJIC No. 2.15] that directly or indirectly addresses the burden of proof" (*Parson*, at p. 355), the CALCRIM No. 376 pattern instruction alerts the trier of fact to the reasonable doubt standard. CALCRIM No. 376 reminded the jury in defendant's case that it could not find him guilty "of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." A fortiori, defendant's constitutional claims regarding CALCRIM No. 376 fail; the trial court did not err in giving the instruction. To hold otherwise would be to contravene the rule that we must adhere to *Parson* as a precedent of our Supreme Court on this question. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

II. *California Prison Records*

Defendant requests that this court review Joe Silva's sealed prison records to determine if they contain discoverable information regarding any in-prison violent acts he has committed. He further requests that, if our review finds that the records do contain information about any such acts, we disclose them to defense counsel with directions to brief the issue of prejudice. (See *People v. Gaines* (2009) 46 Cal.4th 172, 176, 182-185.)

Prior to trial, the defense issued a subpoena duces tecum to the California Department of Corrections and Rehabilitation regarding Silva's prison records. In a hearing, counsel narrowed the scope of the request, explaining that "we would limit our request for records only to any acts of violence against staff or other inmates and any record of disciplinary action taken in response to those. I think they're commonly called 115's." Counsel for the corrections department agreed to an in camera review of Silva's prison records, which the court undertook. After examining the records in camera, the court ruled that they contained no discoverable information. "There is nothing in the records," the court announced in open court.

The parties dispute whether defendant has made a sufficient showing regarding the withholding of pertinent information to justify his request. Given that the trial court reviewed Silva's sealed prison records, however, we see no reason not to do likewise in this case. We have reviewed Silva's records and conclude that they contain no pertinent information.

III. *Multiple Punishment for the Crimes*

Defendant claims that the trial court erred under state law in sentencing him to three years' imprisonment for the robbery and consecutively to 25 years to life in prison for the first degree murder, for a total term of 28 years to life in prison. He argues that, even if we affirm the judgment in all other respects, his sentence must be set at 25 years to life in prison. We agree.

Subdivision (a) of section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Our Supreme Court has interpreted section 654 as providing that conduct that violates more than one criminal provision is not subject to multiple punishments unless the defendant had distinct intents and objectives in perpetrating multiple crimes in one criminal operation. "The proscription against double punishment in section 654 is applicable where there is a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute within the meaning of section 654. The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one." (*People v. Bauer* (1969) 1 Cal.3d 368, 376; see *People v. Hicks* (1993) 6 Cal.4th 784, 789 [" '[i]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]' "].) This court has recently taken note of and applied these legal rules. (*People v. Le* (2006) 136 Cal.App.4th 925, 930-931.)

A trial court's interpretation of the case's facts in deciding the effect of section 654 on multiple punishment for multiple offenses is reviewed under a deferential substantial-evidence test. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731 (*per curiam*).)

The trial court explained its application of section 654 as follows: "[T]hey were separate and distinct acts. The defendant could have robbed Mr. Luman without killing him and he could have killed Mr. Luman without robbing him. And in fact the evidence is that they started to rob him and stabbed him at a different time than the actual robbery, although they might have been intermingled somewhat. [¶] Also, the law indicates that a

robbery and a murder are not necessarily the same act when you do kill someone during a robbery."

"[T]he law gives the trial court broad latitude in making this determination." (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626.) But "deference is not abdication." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) It remains "well settled that '[s]ection 654 bars multiple punishments for separate offenses arising out of a single occurrence where all of the offenses were incident to one objective.' " (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.) And in evaluating the evidence in order to decide a multiple-punishment issue under section 654, the trial court must not ignore the verdicts' factual underpinnings. (See *People v. Coelho, supra,* 89 Cal.App.4th at p. 865 [in deciding whether it has discretion to impose consecutive sentences under the "Three Strikes" law, the court "must know the factual basis of each conviction"].) "[A]t sentencing, a trial court *must* accept and rely upon the same factual basis which the jury unanimously selected and relied upon to convict the defendant on a particular count." (*Id.* at p. 876.) In our view, the trial court here did not do so with sufficient precision. "In some situations, the factual bases of the verdicts will be obvious" (*id.* at p. 874), and this is one such situation. The prosecutor stated at closing argument, "when this group descended upon [Luman], the group of people led by Silva and [defendant,] . . . [Luman] knew very quickly that what they wanted was his money. He fought back with all he had. And as a result of fighting back, he was killed." "[B]ecause he resisted, he was murdered," the prosecutor explained. In sum, the prosecutor later argued, "this was a robbery . . . . [¶] This wasn't just a physical assault for the sake of assaulting this man[;] . . . this was being done for the purpose of getting his property." The verdicts show that the jury almost certainly not only accepted the prosecutor's theory that there was a sole objective for the crimes, i.e., robbery, but also found that Silva, not defendant, killed Luman. Luman was killed by a knife wound that reached the heart, and the jury found not true the knife-use enhancement allegations for both the robbery and the murder—a finding that

resolved a conflict in the evidence and that is well supported by much, though not all, of the evidence. Almost certainly the verdicts reflect findings that Silva alone caused the death of Luman but that defendant, though not the killer, was guilty on the felony murder theory on which the court had instructed the jury.[6] Evidently the jury rejected the theory

---

[6] The court instructed the jury in language adhering closely to the pattern language of CALCRIM No. 540B. We quote relevant portions of the written instruction it furnished to them:

"This instruction applies if you find the defendant was a coparticipant in a robbery but the defendant was not the person who inflicted the fatal stabbing.

"The defendant may also be guilty of first degree murder, under a theory of the felony murder rule, even if another person did the act that resulted in the death. I will call the other person the perpetrator.

"To prove that the defendant is guilty of first degree murder under this theory, the People must prove:

"1. The defendant committed robbery, or attempted to commit robbery, or aided and abetted a robbery;

"2. The defendant intended to commit robbery, or intended to aid and abet the perpetrator in committing robbery;

"3. If the defendant did not personally commit robbery or attempt to commit robbery, then a perpetrator, whom the defendant was aiding and abetting, personally committed robbery or attempted to commit robbery;

"4. While committing or attempting to commit robbery the perpetrator did an act that caused the death of another person;

"AND

"5. There was a logical connection between the act causing the death and the robbery or attempted robbery. The connection between the fatal act and the robbery or attempted robbery must involve more than just their occurrence at the same time and place.

"A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

"[¶] . . . [¶] The defendant must have intended to commit robbery, or aid and abet to commit the felony of robbery [*sic*] [,] before or at the time of the act causing the death.

"It is not required that the person die immediately, as long as the act causing the death and the felony are part of one continuous transaction. [¶] . . . ."

of premeditated murder with express malice on which it also was instructed.[7] Felony murder does not require any particular mental state at all vis-à-vis the homicide, let alone one of intent to kill. Liability for felony murder requires no culpable mental state except for the mental state needed to satisfy the elements of the underlying crime. That is so because " 'malice,' the mental state which otherwise distinguishes murder from voluntary manslaughter, is not an element of felony murder. The only mental state required for felony murder is that necessary for commission of the underlying felony." (*People v. Balderas* (1985) 41 Cal.3d 144, 197.)

In sum, defendant is correct that the record reveals no substantial evidence that he intended both to rob Luman of his money and to kill him for a separate purpose, e.g., out of animus toward him.

To be sure, our Supreme Court has expressed some misgivings about its single-objective test (*People v. Britt* (2004) 32 Cal.4th 944, 952), and it commented in an aside that "cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous. In those cases, multiple punishment was permitted." (*Ibid.*) In this case, however, we discern no substantial

---

[7] The parties shared the view that a not true finding on the knife-use enhancement allegations would mean that the jury relied on the felony murder theory. When the trial court received the written verdicts, it noticed that the jury had neglected to answer true or not true to the knife-use allegations. "I don't know if that means they're hung or they decided not to look at it," the court commented. The parties and court discussed how to proceed. Both parties agreed that it would be useful to ask the jurors to make clear their findings, if any, on the knife-use allegations before the court formally received the verdicts. Defense counsel said, "There are some arguments about whether felony murder is cruel and unusual punishment. . . . I guess if they thought he was the stabber, then the finding with respect to the knife would be significant." The prosecutor replied, "I agree. I think that their verdict on the weapon enhancement would shed light on how they evaluated count one," i.e., the murder charge. The jury entered not true findings on the verdict forms for the enhancement allegations and the court then formally received the verdicts.

evidence that defendant held consecutive but similar objectives or simultaneous different objectives. The evidence regarding defendant—the relevant "actor" (*People v. Bauer*, *supra*, 1 Cal.3d at p. 376) for purposes of applying this test—was that he intended solely to rob Luman. (See *People v. Le*, *supra*, 136 Cal.App.4th at p. 931.)

The People rely on cases that, as the People describe them, have held "that a gratuitous act of violence against an unresisting victim, or an additional crime to facilitate escape or to discourage the reporting of a crime, may be grounds for separate punishment. [Citation.] Moreover, section 654 does not apply when the assailant uses more force than is necessary to effectuate the robbery, or to punish the victim for resisting. [Citations.]"

The People are correct about the state of the law. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271-272; *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1299-1300; *People v. Saffle* (1992) 4 Cal.App.4th 434, 438-440.) We have no quarrel with the holdings of these cases but note that none of them involved the circumstances of this one, i.e., in which there was a robbery and a killing but the verdict (viewed in light of the testimony and the prosecutor's closing argument) makes it almost certain that the jury found that defendant's sole objective was to obtain money from Luman. In *Sandoval*, by contrast, after the robbery was complete the defendant "determined for his own purposes to punish [the victim]" (*Sandoval*, at p. 1299). In *Saffle*, "once the sexual offenses were completed, Saffle's objective changed. . . . [H]e was seeking to prevent [the victim] from reporting the incident." (*Saffle*, at p. 440.) In *Cleveland*, the perpetrator and the victim "had a history of negative interaction" (*Cleveland*, at p. 272) and the violence the former inflicted on the latter was " 'extreme' " and "gratuitous" (*ibid*.; see *id*. at pp. 266, 267, 271-272), suggesting " 'a different and more sinister goal than mere successful commission of the original [robbery]" (*id*. at p. 272) and "supporting the finding of two simultaneous intents" (*ibid.*). By contrast, the evidence here suggested that defendant struggled with Luman, perhaps helping to overpower him as he resisted the robbery, and

rummaged through his pockets in a search for valuables. Even if the stabbing of Luman exceeded the force needed to complete the robbery the jury almost certainly concluded that defendant was not the man wielding the lethal instrument.

When a sentence consisting of an indeterminate life term consecutive to a shorter determinate term contravenes section 654's prohibition against multiple punishment, a permissible remedy is to direct the trial court to stay the punishment for the shorter determinate term. (*People v. Pakes* (2009) 179 Cal.App.4th 125, 127; see § 654, subd. (a) [the actor "shall be punished under the provision that provides for the longest potential term of imprisonment"].) Defendant requests that the punishment for his robbery conviction be stayed. We agree that such is the proper remedy. We will, accordingly, reverse the judgment in part and remand for resentencing.

IV. *Restitution Fine Amount*

Defendant claims that the trial court erred under state law in imposing a $10,000 general restitution fine—i.e., a fine based on the seriousness of the offense. (The court imposed a $2,800 victim restitution fine separately, which defendant does not challenge.)

The trial court recited at sentencing: "A restitution fine of $10,000 is imposed with the formula permitted by Penal Code section 1202.4[, subdivision] (b)." Defendant views the court's use of the term "formula" as evincing an intent to fine him according to a statutory formula that defendant contends the court miscalculated.

Section 1202.4 provides in pertinent part:

"(a) [¶] . . . [¶] (3) The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay both of the following:

"(A) A restitution fine in accordance with subdivision (b).

"(B) Restitution to the victim or victims, if any . . . .

"(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.

"(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony, and shall not be less than one hundred dollars ($100), and not more than one thousand dollars ($1,000), if the person is convicted of a misdemeanor.

"(2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted."

Acknowledging that the trial court enjoyed discretion to set the fine amount, defendant contends that the court, as shown by its invoking the word "formula," meant to impose a $200 fine per year of imprisonment as provided for in section 1202.4, subdivision (b)(2). He further argues that because his proper sentence is 25 years to life imprisonment, the fine should be $5,000, i.e., $200 multiplied by 25 years. To base the fine on the indeterminate nature of the sentence, he maintains, would not result in a calculable fine, given that his life expectancy is unknown.

We think defendant relies too much on the trial court's invocation of the word "formula." The statute provides that the trial court enjoys discretion to set the fine amount based on the offense's seriousness. (§ 1202.4, subd. (b)(1).) Few offenses, if any, are more serious than first degree murder. The record makes plain that the court meant to sentence defendant under subdivision (b)(1) of section 1202.4. It made no effort to engage in any years-based calculation of the type offered in subdivision (b)(2) thereof. Moreover, the probation report recommended a $10,000 fine, in a terse clause in which it also used the word "formula" but made no attempt to calculate the amount according to the formula set forth in subdivision (b)(2) of section 1202.4.

Defendant's reliance on *People v. Le*, *supra*, 136 Cal.App.4th 925, is unavailing. Defendant argues that in *Le* we found, as we do here, that section 654 applied in the

defendant's favor and, having done so, we reduced the restitution fine according to the reduction in years of sentence and the number of felonies to which the fine applied. (*Le*, at pp. 935-936.) The difference, however, is that the trial court in *Le* "relied on the formula provided by section 1202.4, subdivision (b)(2) . . . ." (*Id*. at p. 935.) The court here had no similar intention.

DISPOSITION

The judgment is reversed in part and affirmed in part. The judgment is reversed and remanded for resentencing in accordance with the views expressed in part III of this opinion. In all other respects, the judgment is affirmed.

_____
Duffy, J.

WE CONCUR:

_____
Rushing, P. J.

_____
Elia, J.